Supreme Court, U.S.
FILED
SEP 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-174

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

EDWARD O. TURNER,
Petitioner,

v.

ELISE D. MCINTOSH, SUSAN C. SORRELLS, ODESSA HOLLIS, ANN E. KENNEDY, JOANN SCHERBRING, CASPAR W. WEINBERGER, Secretary of Defense, and JOHN O. MARSH, JR., Secretary of the Army,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY OF PETITIONER TO BRIEF IN OPPOSITION

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Two contentions in the Brief in Opposition require a short reply.

1. In arguing that grievance review under Army Regulation 690-700 was unavailable, Respondents[1] offer a number of reasons which in fact only emphasize the existence of available remedies, and also illustrate the invalidity of the entire notion that Turner's conduct could

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[1] "Respondents" refers to those who were Plaintiffs below.

be treated as giving rise to a claim so severable from its personnel context that it could be remedied only by sanctioning a *Bivens* suit. Respondents point first to an alleged exception for "members of the union bargaining unit" (br. in opp. 7),[2] and then to an exception for matters subject to the final administrative review of the Office of Personnel Management ("OPM") (*id.*). But their argument only underlines the pervasiveness of remedies available in this sphere of personnel law, and the fact that Respondents' claims are necessarily covered by either the Army grievance regulations or parallel collective bargaining agreement remedies established under 5 U.S.C. § 7121,[3] and/or OPM procedures. That the panoply of potential remedies may be even more extensive than those discussed in the Petition (pp. 11-12) only renders the creation of *Bivens* remedies all the less explicable, and all the more clearly violative of *Bush* v. *Lucas*, 462 U.S. 367 (1983), and the other rulings of this Court relied on in the Petition.

Finally, Respondents contend that the Army grievance procedure was "unavailable because the matter arguably involved 'non-selection from a properly constituted referral list or certificate of candidates'" (br. in opp. 7). But Respondents' position below was that the list was *im*properly constituted, and that Turner precluded an appropriate reconstituting of a proper list. Those claims are obviously not within the exclusion for grievance coverage they cite.

Plaintiffs acknowledge that this case "involves the denial of promitions [*sic*]" (br. in opp. 3), and that there is "an EEO remedy for the denial of the promotions" (*id.* at 7). Turner's conduct, they contend, affected the

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[2] Actually the exception is for "(16) A matter raised by a bargaining unit employee that is covered by the negotiated grievance procedure" (Pet. App. 92a).

[3] *See generally Cornelius* v. *Nutt*, 472 U.S. 648, 657-659 (1985).

evidence of the relative qualifications of the Plaintiffs and the selectees which in turn impacted their discrimination claims and the EEO process (*id.*). The entire Cross-Petition (O.T. 1987, No. 87-377) is based on the overlap of issues between the discrimination claim and the claim against Turner. In all justice and reality, the purported schism relied on in the Brief in Opposition is nothing more than artful pleading. The short of this case is that there were other remedies, for example invocation of adverse inferences in the EEO process itself,[4] as well as the others mentioned in the Petition and above, for Turner's alleged conduct.

2. Respondents' contention that the qualified immunity questions are not properly before the Court because of the phrasing of the Questions Presented is put to rest by *Procunier* v. *Navarette*, 434 U.S. 555, 559-560 n.6 (1978). This Court there held that, for purposes of its Rules (now Rule 21.1.(a)), such immunity issues were fairly comprised within questions presented related to whether certain official actions raised Constitutional claims covered by 42 U.S.C. § 1983, and noted that "[i]n any event, our power to decide is not limited by the precise terms of the question presented." *See also United States* v. *Mendenhall*, 446 U.S. 544, 551-552 n.5 (1980); *Cuyler* v. *Sullivan*, 446 U.S. 335, 342-343 n.6 (1980).

The Opposition cannot withstand analysis.

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[4] In addition to the authorities noted in the Petition at p. 12 n.4, *also cf., e.g., Callahan* v. *Schultz*, 783 F.2d 1543 (11th Cir. 1986); *Atlantic Richfield Co.* v. *U.S. Dept. of Energy*, 769 F.2d 771, 794 (D.C. Cir. 1984); *International Union (UAW)* v. *N.L.R.B.*, 459 F.2d 1329 (D.C. Cir. 1972).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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